Petition

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81-2029

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

Mary ~~LEWIS~~ VASILE, ET AL
PETITIONERS

v.

LOCAL 676, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Can a union fulfill its duty of fair representation established under the National Labor Relations Act, 29 U.S.C. §159(a) by intervention on behalf of its members in hearings conducted before the Interstate Commerce Commission, an administrative Federal Agency with which it has no collective bargaining relationship, while at the same time arbitrarily fail to file a meritorious grievance to enforce its collective bargaining agreement and fail to file an unfair labor practice charge against the employer to bargain in good faith with respect to benefits for its members who were being terminated as a result of the employer's sale of its business?

2. Is intervention before the Interstate Commerce Commission by a union for approval of the sale of operating rights of

employer an acceptable substitute for failure of a union to carry out its collective bargaining responsibilities as the exclusive bargaining representative under the jurisdiction of the National Labor Relations Act, 29 U.S.C. §159(a)?

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v.
LOCAL 676, INTERNATIONAL BROTHERHOOD
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RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE THIRD CIRCUIT

Fifty-seven members of Local 676 of the International Brotherhood of Teamsters, Chauffeurs and Warehousemen of America, petition for a Writ of Certiorari to review the judgment, without written opinion, of the United States Court of Appeals for the

Third Circuit entered February 22, 1982, which affirmed the judgment of the United States District Court for the District of New Jersey. The Petition for Rehearing En Banc was denied and entered March 23, 1982.

OPINIONS BELOW

The judgment, without written opinion, of the United States Court of Appeals for the Third Circuit, entered February 22, 1982 appears in Appendix A, p. 1a. The opinion of the United States District Court of Appeals appears in Appendix B, p. 1b-8b. The portion of the opinion of which review is now sought appears on pp. 2b - 8b. Petition for Rehearing En Banc appears in Appendix C, p. 1c.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals was entered February 22, 1982 (Appendix

A Infra, p. 1a) on denial for rehearing (Appendix C, Infra, p. 1c). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Can a union fulfill its duty of fair representation established under the National Labor Relations Act, 29 U.S.C. §159(a) by intervention on behalf of its members in hearings conducted before the Interstate Commerce Commission, an administrative Federal Agency with which it has no collective bargaining relationship, while at the same time arbitrarily fail to file a meritorious grievance to enforce its collective bargaining agreement and fail to file an unfair labor practice charge against the employer to

bargain in good faith with respect to benefits for its members who were being terminated as a result of the employer's sale of its business?

2. Is intervention before the Interstate Commerce Commission by a union for approval of the sale of operating rights of an employer an acceptable substitute for failure of a union to carry out its collective bargaining responsibilities as the exclusive bargaining representative under the jurisdiction of the National Labor Relations Act, 29 U.S.C. §159(a)?

STATEMENT OF FACTS

In September 1971, Cross Transportation Company, Inc., sold part of its operational rights to National Freight Inc., and the remainder of the operational rights

to five other common carriers, and appointed National Freight, Inc., its agent in control and management of the operational rights of Cross Transportation Company, Inc., under grant of temporary authority of the Interstate Commerce Commission.

On October 14, 1971, Gage Cross, President of Cross Transportation Company, Inc., notified the union of the sale of Cross. After receiving this notice of sale, the union arbitrarily failed to file a meritorious grievance to enforce the terms and conditions of its collective bargaining agreement with Cross Transportation Company, Inc. and took no action against the company to protect the collective bargaining rights of the Cross employees which are provided for under the terms and pro-

visions of the National Labor Relations Act, and the Local 676 Supplemental Agreement thereto.

John F. Greeley, President of Local 676 made a written demand upon the five other carrier vendees to honor the National Master Freight Agreement, one of which he knew was a party signator to the Agreement. Under the terms of the National Master Freight Agreement, a party signator, in purchasing or acquiring operational rights, could only do so by taking on the employees of the selling carrier. The union did nothing further to enforce the National Master Freight Agreement; however, Mr. Greeley did instruct his legal counsel to intervene before the Interstate Commerce Commission.

Following exceptions filed to the

Interstate Commerce Commission's initial decision, which made no provisions for protective covenants for the Cross employees, on March 3, 1977, the Interstate Commerce Commission rendered a decision awarding severance pay to these employees which was further appealed for retroactive employment.

The action before the United States District Court was entered March 5, 1978. Count IV of the amended complaint was allowed by the Court against Local 676 on April 11, 1980.

Count IV alleges that Local 676 owed a fiduciary duty to the former Cross employees as their exclusive collective bargaining representative under the provisions of the National Labor Relations Act and the National Master Freight Agreement to act in good faith

and in a non arbitrary manner to secure and protect the rights of the employees to continued employment and employment benefits with the carrier vendees who had agreed to purchase portions of the operational rights of Cross. Jurisdiction before the District Court was conferred by 28 U.S.C. §1337.

In addition, Count IV stated that Local 676 misrepresented to the Cross employees that the union was doing everything possible to secure these rights and benefits under the Collective Bargaining Agreement. The union falsely represented that neither its officers, agents nor Cross employees could file any grievance against Cross or unfair labor practice charges with the National Labor Relations Board to secure their rights until the Interstate Commerce

Commission gave final approval of the sale and determined the rights of the employees to continued employment with the vendees who had agreed to purchase various portions of the Cross operational rights.

The union stated that the time for filing grievances against Cross, or unfair labor practice charges with the National Labor Relations Board, was tolled pending the final decision of the Interstate Commerce Commission. The Cross employees relied upon these representations which they discovered to be false in May of 1977, when these employees were informed by the decision of the National Labor Relations Board that the six-month statute of limitations for filing unfair labor practice charges had not been tolled by the Interstate Commerce Commission

hearings, and dismissed the unfair labor practice charges as being untimely filed. As a consequence, the Petitioners say that they lost valuable rights of redress and were otherwise damaged.

REASONS FOR GRANTING THE WRIT

This case presents questions of first impressions which the United States Supreme Court has not previously addressed, and questions of such public interest that justice requires a final determination by this Court.

The Petitioners request the United States Supreme Court to determine if intervention before the Interstate Commerce Commission, a Federal administrative agency having no collective bargaining jurisdiction, can serve as

a substitute for the union's obligation to negotiate, administer and enforce a collective bargaining agreement or to process a meritorious grievance. In the opinion filed April 11, 1980, the United States District Court stated:

> "No court to our knowledge has extended the duty of fair representation to matters unrelated to the negotiation, administration or enforcement of the Collective Bargaining Agreement."

This is inconsistent with the opinion of the United States District Court dated March 23, 1981, that the decision of Local 676 to intervene before the Interstate Commerce Commission was not arbitrary, but was decided after considering and rejecting the filing of unfair labor practice charges, as provided for by 29 U.S.C.S. §160, and the use of the contractual

grievance machinery, and did not constitute a breach of its duty of fair representation.

This issue, if permitted to stand, would substantially undermine the duty of fair representation owed by a union to its members, as summarized in prior decisions of the Court.

SUMMARY OF THE ARGUMENT

The union's intervention before the Interstate Commerce Commission, a Federal administrative agency which has no collective bargaining jurisdiction, cannot be a fulfillment of its duty of fair representation.

Petitioners know of no case holding that the duty of fair representation did not arise out of the sole and exclusive collective bargaining duty owed to its members under the provi-

sions of the National Labor Relations Act, which affords unions the exclusive power to represent all employees of a bargaining unit.

In the case of I.B.E.W. v. Foust, 442 U.S. 42, 46-47 (1979) S. Ct. 2121 2125 (1979), the Court, with ample reference to prior cases decided by the Court summarized the duty of fair representation:

> "The fair representation doctrine thus serves as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." Under the doctrine, a union must represent fairly the interests of all bargaining unit members during the negotiation, administration and enforcement of collective bargaining agreements. In particular, a union breaches its duty when its conduct is "arbitrary, discriminatory or in bad faith." as for example, when it "arbitrarily ignores a meritorious grievance or processes it in a perfunctory fashion."

CONCLUSION

There is error in holding that the union fulfilled its duty of fair representation owed to the Petitioners. A Writ of Certiorari should issue.

Respectfully submitted,

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 81-2108

MARY VASILE, ROBERT RICHARDS, WILLIAM G. McCALLISTER, CHARLES J VINEYARD, ANN BROWN, JOHN F. POWELL, LESTER FRAZER, HERMAN SPENCER, THOMAS W. BAKER, ROBERT MACK, WARREN BRANDRIFF, KENNETH D. CAMP, WARREN SMITH, LESLIE D. ORANGE, CARLETON A PETERSON, GEORGE LEDEN, EDWARD McBRIDE, DONALD M. MILLER, SR., WILBUR E. SCHULTZ, ROBERT L. LOWERS, THOMAS COOMBS, JR., RAYMOND R. RILEY, JAMES E. COLLINS, WILLIAM JOHNSON, OTTO HINTZ, DONALD McCALISTER, HARRY G. BUTLER, JR., WALTER M. DUNHAM, RALPH BARILE, PHILIP P. BROOKS, SR., LEWIS E. JOHNSON, SR., RICHARD W. HALTER, CLARENCE BROOKS, R. SHIRLEY TAYLOR, HENRY

M. EMENECKER, JR., THOMAS TRESS, JOSEPH M. JOHNSON, CLARENCE KWASNICKI, EDWARD KWASNICKI, LEWIS B. SHULTZ, SR., KARL NAURATH, WILLIAM C. BROOKS, LESTER CUFF, LEWIS GOFF. CHARLES W. PLUMMER, HUGO HINTZ, LEON JARREL, JR., GEORGE A. WEBSTER, WILLIAM T. CRIST, CHARLES E. GOULD, JR., JOHN B. MOORE, BERNICE HALTER,NEIL LANG, KARL GLAHE, ISAAC S. ALLEN, GEORGE WILLIAMS, GEORGE D. TREMBLY,

APPELLANTS

v.

NATIONAL FREIGHT, INC., A VIRGINIA CORPORATION, CROSS TRANSPORTATION, INC., A NEW JERSEY CORPORATION, LOCAL 676 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

ON APPEAL FROM THE UNITED STATES

DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

NO. 78-0598

ARGUED: FEBRUARY 16, 1982

BEFORE: ADAMS and SLOVITER, CIRCUIT JUDGES

and VanARTSDALEN, DISTRICT JUDGE*

JUDGMENT ORDER

After considering the contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs to be borne by appellants.

BY THE COURT

Signed: ADAMS
CIRCUIT JUDGE

ATTEST:

S/d Sally Mrvos
Sally Mrvos, Clerk

Dated: February 22, 1982

*Hon. Donald W. VanArtsdalen, United States District Judge, for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

LEWIS VASILE, ET AL — CIVIL ACTION

PLAINTIFFS — 78 958

v.

LOCAL 676, INTERNATIONAL

BROTHERHOOOD OF TEAMSTERS

DEFENDANT — OPINION

ORIGINAL FILED: APRIL 23, 1981

APPEARANCES:

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ATTORNEYS FOR DEFENDANT

GERRY, District Judge

Plaintiff union members bring this action against their local union for breach of the statutory duty of fair representation due the plaintiffs under the provisions of the Labor Management Relations Act (LMRA), 29 U.S.C. § 141, et seq. Plaintiffs have alleged that the union misrepresented to plaintiffs that it was doing everything possible to secure the plaintiffs' rights and benefits under the collective bargaining agreement then in force between defendant and Cross Transportation, Inc., and that the union falsely represented the availability of,

limitations on and the union's willingness to undertake the filing of complaints before the National Labor Relations Board (NLRB). The court, on September 14, 1978, dismissed Counts I and II of plaintiffs' complaint. Count I alleged that defendants, Cross Transportation, plaintiffs' employer, and National Freight, the company which purchased Cross' operating rights, breached the collective bargaining agreement by discharging the plaintiffs. In Count II, plaintiffs claimed that Local 676 and the International Brotherhood of Teamsters (IBT) breached a duty of fair representation owed to them by failing to protect plaintiffs' rights to continued employment and other employment benefits with the carriers purchasing the Cross operational rights. The

Court held that both these counts were time barred. On April 11, 1980 the court granted summary judgment in favor of defendant Local 676 and IBT as to Count III wherein plaintiffs contended that defendants Local 676 and IBT breached their duty of fair representation by falsely and fraudulently representing that the statute of limitations applicable to filing an unfair labor practice against National and Cross was tolled pending the ICC approval of National's purchase of Cross; rights. The court held that the duty of fair representation did not encompass an obligation on the part of a union to advise its members of their rights under the NLRA. Thus, the only claims before us now are those raised in Count IV, for misrepresentation as to the local union's undertakings to

protect the plaintiffs' jobs. Plaintiffs seek damages for lost wages and benefits as well as interest, costs and attorney's fees.

As a consequence of the potentially dispositive character of the liability question, the issue of the defendant's breach of the duty of fair representation was bifurcated from the issue of damages and tried befire tge ciyrt without jury.

The sole issue before the court at this time is whether or not plaintiffs have sustained their burden of proving a breach by Local 676 of its duty of fair representation.

To establish a breach of a duty of fair representation, plaintiffs must prove that Local 676 acted in an arbitrary, discriminatory or bad faith man-

ner with respect to its representations as to both actions undertaken and future actions regarding the Cross closing and as to the status of the Cross situation. Vaca v. Sipes, 386 U.S. 171 (1967); Hubicki v ACF Industries, 484 F.2d 519 (3d Cir. 1973)

Consistent with its function as the trier of fact in this non-jury matter, the court makes the following findings:

1. Teamsters Union Local 676 ("Local 676 or "Union") is a labor organization representing employees in an industry affecting commerce as defined in the LMRA.

2. Cross Transportation, Inc. was an employer in an industry affecting commerce, as defined in the LMRA. Prior to October 1971, Cross was engaged in the trucking business.

3. At all times material herein, Local 676 and Cross were parties to the National Master Freight Agreement (NMFA).

4. Plaintiffs were employees of Cross at its Bridgeton, New Jersey, facility until it was closed in October 1971.

5. Pursuant to the terms of the Collective Bargaining Agreement, Local 676 was the exclusive bargaining agent of Cross' drivers and mechanics employed at the Bridgeton facility.

6. In September 1970, J. Gage Cross, President of Cross Transportation, sent a written notice to all employees to dispel rumors that the company was on the verge of closing.

7. In mid-1971, Cross sought concessions from the Union in bargained-for employee benefits.

8. Cross' financial condition worsened during 1971. Employees were laid-off and operations curtailed.

9. During the summer of 1971, employees left Cross to seek other more secure employment.

10. On August 18, 1971, Union President John Greeley, vice president Charles Morris and two stewards met with com-

pany officials Gage Cross and William Conway to discuss Cross going out of business. Mr. Cross informed the Union that he could not say who would buy the business.

11. On October 8, 1971, the union leaders again met with Cross officials. Mr. Cross stated that the company's operating rights had not yet been sold and that he would inform the union when a sale occurred.

12. On October 14, 1971, Gage Cross wrote to Local 676 informing it of the names of the purchasers of Cross' operating rights.

13. On October 15, 1971, President Greeley wrote letters to each of the acquiring carriers, except National Freight, regarding their obligations, if a signatory under the National Master Freight Agreement.

14. Union officials met with representatives of National Freight, the carrier acquiring the lion's share of Cross' operating rights, particularly in South Jersey, on October 29 and November 29, 1971.

15. At the October 29 meeting, Bernard Brown, president of

National, was questioned about hiring Cross employees. The Union made clear that its interest was in protecting jobs for the Cross drivers and mechanics.

16. National Freight was under contract with Local 676 but not under the National Master Freight Agreement.

17. The Union held meetings on October 26, October 31 and November 6, 1971, for the Cross employees to discuss the status of the Cross closing and to inform them of meetings between the Union and Cross and National Freight.

18. The Union held regular meetings on October 31, 1971, January 10 February 27, April 30, May 28, September 24, October 29, November 26, 1972 and January 28, February 25, March 25 and April 29, 1973, at which the members' questions on the Cross situation were answered.

19. At the meeting between the Union leaders and Cross officials on August 18, October 8 and November 2, 1971, the Union negotiated with Cross concerning the closing severance pay, vacation pay and letters of recommendation for the members.

20. At the November 2 meeting between the Union and Cross, the parties discussed the future of New Jersey Truck Rental, a truck leasing firm owned by Gage Cross. Cross gave assurances that New Jersey Truck Rental would not engage in business, and that if it did resume operations former Cross employees would be given available jobs.

21. During late 1971, early 1972, Union President Greeley consulted with attorney Robert O'Brien concerning the protection of the former employees' rights. The two agreed that the most significant degree of protection would be obtained from intervention in ICC proceedings which involved the approval of the sale of Cross' operating rights. The Union would seek to have the ICC impose protective conditions on approval of the sale of operating rights.

22. Local 676 president Greeley also discussed with Mr. O'Brien the possibility of filing an unfair labor practice charge against Cross with the NLRB. They considered this alternative but agreed that it would be of no value since the company was bargaining in good

faith and the Board's remedy would not obtain jobs or severance pay from a defunct company.

23. At Union meetings in late 1971-1972, plaintiffs asked the Union to protect their jobs and to maintain their employment.

24. Plaintiffs assumed that under the collective bargaining agreement, Cross employees had the opportunity to maintain their seniority rights and go with the company as it was sold.

25. Plaintiff Louis Johnson, Sr., did not seek employment with other carriers, he expected the Union to keep his job.

26. Plaintiff Elwell did not apply to National for a job because he wanted to try to keep his seniority by waiting to see what the Union could get him.

27. Plaintiff Brandriff did not believe that any Cross employees should have to go to National to apply for a job; the employees were entitled to a job.

28. At the regular monthly Local Union meeting on February 27, the late Kenneth Halter, one of the former Cross employees, raised a question concerning limita-

tions on taking actions on the Cross situation.

29. A number of plaintiffs understood Mr. Halter to ask about the statute of limitations on unfair labor practice charges and thought that Mr. Greeley stated that there was no statute of limitations.

30. Mr. Greeley thought Mr. Halter's question involved whether or not a strike could be called against Cross if it resumed operations.

31. The court finds, because of the confusior of plaintiffs about the term grievance and their testimony that they sought from the Union answers concerning how their jobs could be protected, that Mr. Greeley's testimony is more credible.

32. Plaintiff Joseph Johnson stated that the Union never said anything about going to the NLRB if the ICC ruled against them.

33. Plaintiff Philip Brooks, Sr., stated that at the Union meetings there was no talk about filing unfair labor practice charges, only about the statute of limitations.

34. At no time did Mr. Greeley or other Union officials represent that the Union had undertaken the responsibility to file unfair labor practice charges against Cross, National Freight or any

other party regarding the shutdown.

35. Plaintiffs Powell and Lang contacted the NLRB on their own concerning the filing of charges. Of the other plaintiffs, no one testified that he was relying on the Union to file charges with the NLRB.

36. Plaintiff Powell testified that the filing of grievances under the collective bargaining agreement was discussed at Union meetings. The grievances to be filed under the contract were concerned with severance or vacation pay or whatever the members had coming to them.

37. The Union, in its meetings with Cross, negotiated over severance pay and vacation pay.

38. The Union intervened in the ICC proceedings concerning the sale of Cross' operating rights in order to obtain, inter alia, as a protective condition to the grant of permanent rights, severance pay.

39. Mr. Greeley and Union attorney O'Brien did in fact participate in ICC hearings, presenting testimony regarding the impact of the closing on Cross employees. Mr. O'Brien subsequently submitted a brief to the ICC on

behalf of the Union.

40. The ICC hearing on May 15, 1972, was attended by shop steward Moore and committeemen Crist and Halter at the suggestion of the Union.

41. Thereafter, a group of former Cross employees retained their own counsel, Albert Auburn. Mr. Auburn filed a petition for leave to intervene and participated in further hearings on April 30, 1973.

42. Mr. Greeley disagreed with the employees' decision to retain separate counsel because he felt that a reopening of the proceeding would delay a final determination and that the employees were already adequately represented by Mr. O'Brien, at no cost to themselves. Mr. Greeley expressed his displeasure and the reasons therefor in a letter to Kenneth Halter. Despite his feelings, Mr. Greeley helped Mr. Halter subsequently to obtain employment.

43. The Union obtained letters of recommendation from Gage Cross for the former employees.

44. Mr. Greeley and Mr. Morris tried to assist former Cross employees in obtaining employment.

45. Under the final decision of the ICC, the proposed sale of Cross'

operating rights was conditioned on the acquiring carriers paying up to six weeks severance pay and giving preferential hiring rights to former Cross employees.

46. Subsequent to this decision, Local 676 officers and their attorney undertook extensive communication with the new carriers and former Cross employees in order to secure the benefits of the decision.

47. At no time during the period 1971-1978 did Local 676 ignore the concerns of its Cross members nor fail to undertake any action which it felt would protect their employment.

Defendant union has objected to our consideration of plaintiffs' claims relating to the union's failure to pursue the contractual grievance procedure. Plaintiffs' amended complaint contained a vague suggestion of this claim. However, plaintiffs' submission to the most recent amendment to the pretrial order spelled out the contention in detail. Nevertheless, defendant asserted surprise at trial when plaintiffs identified the claim as an is-

sue for trial. Defendant argues that the earlier opinions of the court in dismissing Counts II and III of the complaint as well as the recent opinions of September 19, 1980, denying defendant's motion for summary judgment, and of December 5, 1980, granting the International Union's motion for summary judgment, had identified the only issues which were left open for proofs. These issues comprehend defendants contend, only those claims relating to the failure to file and pursue unfair labor practice claims before the NLRB. The court has reviewed its prior opinions and finds that, although it dismissed claims arising out of the alleged breach of the duty of fair representation caused by defendant's failure to protect plaintiffs' rights to continued employment and continued employment benefits, it nowhere explicitly

rejected or otherwise discarded a claim that the union had made representations to plaintiffs regarding the filing of grievances under the contract and the union's assumption of the task of filing the grievances. In addition, in none of the court's opinions did it identify the issues for trial. Therefore, we conclude that the defendant's claim of surprise is unwarranted and that defendant was alerted to this claim by plaintiffs' submission in connection with the pretrial order. Accordingly, we overrule defendant's objections to our consideration of this claim.

Turning to the merits of this dispute, under all the foregoing facts, we find that the conduct of Local 676 and its decision to pursue remedies before the ICC was not arbitrary but was decided upon rationally, after consideration of

the possible relief available through other avenues, and was designed to secure the maximum protection of plaintiffs' interests. There is not the slightest suggestion that the union sought to foreclose plaintiffs' access to other remedies, and the evidence fails to disclose any discriminatory conduct or the presence of requisite union indifference or hostility. The court has found nothing in the union's conduct to suggest that the union made misrepresentations as to the statute of limitations for filing unfair labor practice charges or that the union represented that it would file either grievances or charges on behalf of the former employees. None of plaintiffs' witnesses testified to even asking the union to make these filings. Moreover, two of the plain-

tiffs contacted the NLRB on their own. We conclude from the facts that plaintiffs have failed to adduce any evidence in support of their allegations of union misrepresentations. Even viewing the evidence in the light most favorable to plaintiffs, the most we can conclude from the facts is that the union considered and rejected certain remedies, specifically the filing of unfair labor practice charges and the use of the contractual grievance machinery. In our view, this evidence is insufficient to establish a breach of the duty of fair representation.

A union is permitted a wide range of reasonableness in serving the employees it represents. Hines v. Anchor Motor Freight, 424 U.S. 554 (1976). The union should be able to exercise its judgment as to the best method of pro-

tecting its members' interest, so long as it does not act in an arbitrary, discriminatory or bad faith manner. Given the circumstances in the instant case where recourse to either the contractual grievance machinery or the NLRB would be against Cross (National was not a party to the NMFA), which was out of business and unable to provide the union members with continuing employment, plaintiffs' first concern, we find that the union's decision to seek intervention before the ICC was within the range of reasonableness and certainly constituted no breach of the duty of fair representation. See Florey v Airline Pilots Ass'n International, 575 F.2d 673 (8th Cir. 1978).

The damages question bifurcated by the court is rendered moot by our decision. The complaint will be dis-

missed, with prejudice and without assessment of costs.

The foregoing constitutes the court's findings of fact and conclusions of law. Counsel for defendant will submit an order consistent with this court's opinion.

Signed
JOHN F. GERRY, U.S.D.J.

Dated: April 23, 1981

APPENDIX C

1c

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 81-2108

MARY VASILE, et al.,

Appellants

v.

NATIONAL FREIGHT, INC., etc., et al

(C.A. No. 78-0598)

SUR PETITION FOR REHEARING

EN BANC

PRESENT: SEITZ, CHIEF JUDGE, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGENBOTHAM, SLOVITER AND BECKER, CIRCUIT JUDGES, AND VanARTSDALEN, DISTRICT JUDGE*

The Petition for rehearing filed by Appellants

In the above entitled case having been submitted to the judges who participated

in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

Signed: ADAMS

Circuit Judge

Dated: March 17, 1982

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* Hon. Donald W. VanArtsdalen, United States District Court for the Eastern District of Pennsylvania, sitting by designation.